Supreme Court, U.S.
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No. 01-46

IN THE

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,
Petitioner,

v.

SOUTH CAROLINA STATE PORTS AUTHORITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL MARITIME COMMISSION

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REPLY BRIEF FOR THE FEDERAL MARITIME COMMISSION

I. Cases considering the limitations on Congress' authority to abrogate the States' sovereign immunity from suit in federal or state court do not address the question presented in this proceeding.

The South Carolina State Ports Authority (SCSPA) has conceded (Br. 3-4) that the Federal Maritime Commission retains regulatory jurisdiction over its operations, and that an administrative adjudication to determine whether it is in compliance with the Shipping Act of 1984 would be permissible. See *California v. United States*, 320 U.S. 577 (1944) (holding that the Shipping Act of 1916 applies to state-run ports). SCSPA contends, however, that it is entitled to sovereign immunity from an agency adjudication whenever the adjudication is initiated through the filing of a complaint by a private person. SCSPA relies (Br. 9-24) on several of this Court's opinions holding that Congress may not abrogate the States' traditional sovereign immunity from suit in the federal courts and in the States' own courts. SCSPA errs, however, in relying on cases that pertain to the scope of Congress' abrogation authority. The relevant inquiry in this proceeding is not whether a traditional sovereign immunity from suit has been abrogated; rather, it is whether state instrumentalities are immune from a regulatory procedure created by Congress and administered by an independent Executive Branch agency. Cases that address Congress' limited authority to abrogate the States' known and traditional sovereign immunity from suit in federal and state courts do not answer the question whether state sovereign immunity from Executive Branch regulatory adjudications would be consistent with the constitutional design.

1. This Court's opinion in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), does not support SCSPA's argument (Br. 13) that state instrumentalities are entitled to assert "sovereign immunity in federal administrative proceedings." In

Seminole Tribe, the Court faced a circumstance in which the States' sovereign immunity from suit was unquestionably implicated: a private suit filed in a federal district court. 517 U.S. at 52. The Court addressed whether Congress has the authority to abrogate the States' immunity from such a district court suit through a statute passed under the Indian Commerce Clause. *Id.* at 53. Because "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction," the Court held that Congress could not abrogate the States' immunity from suit. *Id.* at 72-73. While SCSPA contends (Br. 12) that the Court's reference in *Seminole Tribe* to "federal jurisdiction" was meant to include "federal administrative agencies sitting in an adjudicative capacity," it is clear from the context of the opinion that by "federal jurisdiction" the Court referred to jurisdiction exercised by federal courts pursuant to the "judicial power under Article III." 517 U.S. at 73. The Commission is not an Article III court, and, as we explain in our opening brief (Br. 20-23), it does not exercise the judicial power of the United States. See *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991); *id.* at 908-914 (Scalia, J., concurring in part and concurring in the judgment). See *infra* at 8-10. The reasoning in *Seminole Tribe*, therefore, was not directed to administrative adjudications like those heard by the Commission.

More generally, the concept of abrogation is not at all relevant to this case. The Commission's position is that constitutional principles of state sovereign immunity from suit do not apply in administrative adjudications, not that Congress has permissibly abrogated any preexisting immunity. See FMC Br. 27 ("there is nothing to indicate that the constitutional structure *implicitly* establishes state immunity from the Commission's adjudication of a privately-filed complaint"). The inquiry in *Seminole Tribe* whether Congress holds the authority to abrogate the States' established Eleventh Amendment immunity from suit in

federal district court is not pertinent to this case. See 517 U.S. at 59 (examining whether "the Act in question [was] passed pursuant to a constitutional provision granting Congress the power to abrogate" the States' Eleventh Amendment immunity).

For abrogation to be relevant, the application of sovereign immunity principles to the federal executive power must first be proved, and as we argue in our opening brief, a traditional state immunity from regulatory adjudications finds no basis in constitutional text, history or design. See FMC Br. 25-33. In the Shipping Act, Congress has established a regulatory system that includes the administrative adjudication of complaints by an "administrative board" exercising "executive power." *Freytag*, 501 U.S. at 909 (Scalia, J., concurring in part and concurring in the judgment). State-run ports are, by the Shipping Act's terms, subject to all of its requirements, see *California v. United States*, 320 U.S. at 585-586, including the adjudication of private complaints filed against them. To frame the issue in terms of abrogation assumes an answer to the question presented here – whether the States are immune from Executive Branch administrative adjudications in the first place.[1] SCSPA's analogy to established concepts of state sovereign immunity from judicial power is misplaced, however, as is its assumption that there is a preexisting state immunity from regulatory adjudications.

2. SCSPA places heavy reliance on *Alden v. Maine*, 527 U.S. 706 (1999). *Alden*, however, does not support SCSPA's argument that the States' immunity from suit is so broad that it applies in any "adversarial proceeding * * * in any forum."

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[1] It is important to note that SCSPA does not claim that it is immune from federal regulation. SCSPA Br. 4. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Reno v. Condon*, 528 U.S. 141 (2000). Rather, it asserts that principles of state sovereign immunity *from suit* apply in the administrative adjudication of a private complaint by the Commission, an independent Executive Branch agency.

Br. 12. The Court in *Alden* addressed the more narrow question whether the system of federalism established by the Constitution permits Congress to subject the States to suit in the States' own courts under a federal cause of action. 527 U.S. at 730-731. The Court observed that there is a "separate and distinct structural principle," apart from the Eleventh Amendment, which "inheres in the system of federalism" and which protects from abrogation the States' preexisting sovereign immunity from suit in their own courts, except where "the States were required to surrender this power to Congress pursuant to the constitutional design." *Id.* at 730-731. The Court explained that "the States *retain* immunity from private suit in their own courts," and examined whether Congress could abrogate that immunity by statute. *Id.* at 754 (emphasis supplied). See also *id.* at 713 ("the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution"); *id.* at 724 (the Constitution was understood "to preserve the States' traditional immunity from private suits"); *id.* at 742 ("in [the States'] own courts * * * more than any other, sovereign immunity was long established and unquestioned"). The Court found that the ratification of the Constitution did not contemplate a surrender of the States' immunity from suit in their own courts, and that Congress therefore lacked authority to abrogate the immunity. *Id.* at 754. *Alden* clarifies that Congress cannot exercise "plenary federal control of state governmental processes," because "the immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself." *Id.* at 749.[2]

[2] The court of appeals therefore erred in holding that "*Alden* makes clear that any proceeding where a *federal officer* adjudicates disputes between private parties and unconsenting states" is not constitutionally permissible. Pet. App. 13a (emphasis supplied). The Court's opinion in *Alden* was not directed towards the adjudication of a complaint by a federal officer; it was concerned with a *state* court hearing a lawsuit against the state itself, pursuant to a federal statute. See *Alden*, 527 U.S. at 711-712.

The "separate and distinct structural principle" that confirms the States' sovereign immunity from suit in their own courts is, by definition, unrelated to the case currently before the Court. This structural principle is not concerned with administrative agencies created by Congress and it does not support SCSPA's suggested application of the States' settled immunity from "the coercive process of judicial tribunals at the instance of private parties," *In re Ayers*, 123 U.S. 443, 505 (1887), to an independent Executive Branch agency that does not exercise coercive judicial power. Accordingly, to maneuver around *Alden*'s inapplicability, SCSPA reduces the Court's opinion to a "public policy" test. Br. 11. By characterizing *Alden* as supplying confirmation that "the doctrine of sovereign immunity does not depend upon the forum, but rather on the identity of the defendant and the plaintiff" (Br. 10), SCSPA focuses solely on *Alden*'s result and overlooks the evidence and reasoning that supported the Court's conclusions.[3] In SCSPA's view (Br. 11-12), *Alden* was grounded on a conclusion that the States' sovereign immunity from suit attaches whenever a private party initiates an "adversarial proceeding" against a State. If this were true, the Court could have decided *Alden* without reference to the Founders' views respecting, and the historical circumstances of, the States' immunity in their own courts. Thus, the Court's recognition that the States' immunity in their own courts "was a principle *so well established* that no one conceived it would be altered by the new Constitution," 527 U.S. at 741 (emphasis supplied), and the Court's analysis of "the historical record" which clarifies that the States enjoyed a traditional immunity from suit in the courts of their creation, *id.* at 743, would have been unnecessary to its holding. It is apparent, however, that these points form the foundation of the Court's opinion, and

[3] Compare, *e.g.*, *Seminole Tribe*, 517 U.S. at 67 ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound").

that to view *Alden* in any other light is to engage in the very "ahistorical literalism" that *Alden* itself warns against. *Id.* at 730.

SCSPA's attempt to separate the result in *Alden* from its historical foundation and to minimize the opinion's concern with curtailing federal control over *state* judicial processes reveals the factual inapplicability of *Alden* to the case before the Court. It also underscores the absence of any evidence to support a constitutional principle of state immunity from regulatory adjudications in maritime commerce. See SCSPA Br. 18 (conceding that "the debates did not address the suability of a state by private parties before a federal administrative tribunal"). As we argue in our opening brief (Br. 17-29), SCSPA's conception of state immunity from adversarial proceedings finds no support in the text of the Constitution, in this Court's decisions addressing the Eleventh Amendment, or in any historical records. SCSPA Br. 12. Indeed, SCSPA's analytical collapse (Br. 34-36) of "suit[s] in law or equity," U.S. Const. amend. XI, into mere "adversarial proceedings" is divorced from all historical and legal context.

SCSPA's contentions are, moreover, inconsistent with *Nevada v. Hall*, 440 U.S. 410 (1979), in which the Court found that the Constitution does not explicitly or implicitly guarantee the States an immunity from suit in the courts of other States. A proceeding in a state court would be "adversarial," and *Hall* may consequently be understood as declining to constitutionalize state immunity from all adversarial proceedings. Finally, SCSPA's theory of state sovereign immunity from adversarial proceedings renders surplusage not only most of the rationale of *Alden*, but also that of virtually all of this Court's other opinions explaining the scope of the States' sovereign immunity from suit.[4] See, *e.g.*, *Hans v. Louisiana*, 134 U.S. 1, 15 (1890) (suits against

[4] We have addressed *Alden* and *Seminole Tribe* in some detail here because SCSPA's primary argument appears to be that those opinions are controlling in the case now before the Court. See SCSPA Br. 7 ("*Alden* commands the answer to the question presented in this case"); *id.* ("the rationale of *Seminole Tribe* requires the application of the doctrine of sovereign immunity to federal administrative proceedings"); *id.* at 9 ("no further authority is needed"); *id.* at 14 ("the only possible conclusion"). SCSPA's amici also rely on the abrogation principles set forth in *Alden* and *Seminole Tribe*. See Br. of Maryland *et al.* 5 ("Congress has no authority under the Shipping Act * * * to abrogate unilaterally the States' immunity"); Br. of Charleston Naval Complex 11 ("Because Congress cannot abrogate a state's sovereign immunity under Article I * * * Congress cannot use the FMC, an Article I creation, to permit a private citizen to sue a state") (citation omitted).

unconsenting states were not "contemplated by the constitution when establishing the judicial power of the United States"); *Ex parte New York*, 256 U.S. 490, 497 (1921) ("it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given"); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984) ("the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III"); *Blatchford v. Native Village of Noatak*, 501 U.S 775, 781 (1991) ("the judicial authority in Article III is limited by this sovereignty").

3. In the view of SCSPA (Br. 31) and its amici (Br. of Maryland *et al.* 11), this Court should assume that the Shipping Act's private complaint procedure is unconstitutional as applied to state instrumentalities unless "compelling evidence" can be brought forward to surmount this presumption. The Court has explained, however, that "[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607 (2000). Application of SCSPA's "compelling evidence" standard in this case would turn on its head the presumption that an Act of Congress constitutes a valid exercise of congressional authority.

Because the States enjoy sovereign immunity from suits in their own judicial fora, it is indeed true that they may be unwillingly subjected to such suits by Congress only when "there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design." *Alden*, 527 U.S. at 731 (quoting *Blatchford*, 501 U.S. at 781). That presumption applies to judicial proceedings from which the States enjoy a traditional immunity. See *Alden*, 527 U.S. at 724 ("the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits"); *Hall*, 440 U.S. at 415 ("[t]he immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries"). In this case, on the other hand, it has already been established that the Shipping Act, as applied to state instrumentalities, is constitutionally permissible. *California v. United States*, 320 U.S. at 585-586. We would submit that there has been no "plain showing" that the complaint provisions of the Shipping Act are any less validly applied to state-run ports than are the other sections of the statute. See *Morrison*, 529 U.S. at 607.

II. The Commission does not exercise the judicial power of the United States, and its adjudication of a complaint is not the functional equivalent of a lawsuit.

SCSPA argues (Br. 32-34) that the Commission exercises judicial power in its adjudication of a privately-filed complaint, such that the Eleventh Amendment and the Court's decisions interpreting that Amendment are literally applicable to this case. It also contends (Br. 34-39) that a Commission adjudication is the functional equivalent of a lawsuit, so the exercise of judicial power is beside the point. It errs on both counts.

1. The Commission does not exercise judicial power when it adjudicates complaints. As Justice Scalia has explained:

> It is no doubt true that all such [administrative] bodies "adjudicate," *i.e.*, they determine facts, apply a rule of law to those facts, and thus arrive at a decision. But there is nothing "inherently judicial" about "adjudication." To be a federal officer and to adjudicate are necessary but not sufficient conditions for the exercise of federal judicial power.

Freytag, 501 U.S. at 909 (Scalia, J., concurring in part and concurring in the judgment). The Commission's adjudication of a complaint under the Shipping Act does not involve an exercise of "[t]he Judicial power of the United States." U.S. Const. amend. XI. "Adjudication, in other words, is no more an inherently judicial function than the promulgation of rules governing primary conduct is an inherently legislative one." *Freytag*, 501 U.S. at 910 (Scalia, J., concurring in part and concurring in the judgment) (internal quotation marks omitted). Nor does the authority to adjudicate complaints transform the identity or nature of the officers charged with administering such adjudications. "[A]dministrative board[s of the United States] exercise the executive power, not the judicial power of the United States." *Id.* at 909. See FMC Br. 20-23. Thus, what SCSPA characterizes (Br. 33) as the "judicial nature" of the Commission's adjudication of a complaint does not convert that adjudication into an exercise of "the judicial authority in Article III," which is precisely the authority limited by the Eleventh Amendment. *Blatchford*, 501 U.S. at 779.

It should also be noted that the court of appeals in this case did not hold that the Commission exercises judicial power when it adjudicates complaints; rather, the court found the Commission's exercise of executive power to be "irrelevant" to the question presented, notwithstanding that the Eleventh Amendment forbids extensions of "[t]he Judicial power of the United States" to suits against unconsenting States. Pet. App. 11a. The court of appeals' opinion is based upon a conclusion that the States enjoy sovereign immunity not only from judicial power, but also,

and more broadly, from all "adversarial proceedings." *Ibid.* It is the Commission's contention that a constitutional immunity from "adversarial proceedings" is unsupportable. See *supra* at 5-7; FMC Br. 17-29.

2. The Commission's adjudication of a complaint is not, as SCSPA suggests (Br. 34-39), the functional equivalent of a lawsuit heard by a federal or state court. A Commission proceeding lacks the primary indicia of, and serves different purposes than, the judicial resolution of a "suit in law or equity." U.S. Const. amend. XI.

a. At the most basic level, the absence of Commission authority to enforce its orders illustrates a fundamental distinction between an agency proceeding and a suit in federal or state court. The Commission must rely on a district court to enforce its orders in the event they are violated. See 46 U.S.C. app. 1711(e) (civil penalties issued by the Commission may be enforced in federal district court by the Attorney General at the Commission's request); *id.* at 1713(c) (nonreparation orders and subpoenas may be enforced in federal district court by the Attorney General at the Commission's request, or by a party); *id.* at 1713(d) (a party to a Commission proceeding may enforce a reparation order in federal district court).[5] Because the Commission *may* request that the Attorney General enforce a Commission order, an enforcement proceeding in the name of the United States by necessity involves a political decision whether to proceed. This Court has explained that an action in court "which is commenced and prosecuted against a State

[5] The issue whether a Commission-issued reparations order is "enforceable" in district court is not before this Court. See 46 U.S.C. app. 1713(d) (enforcement of reparations orders). While the Commission believes that an enforcement proceeding under the Act would not transgress the States' sovereign immunity from suit, Pet. App. 35a-37a, that issue is not ripe because such a proceeding in this case has not been initiated. Indeed, the Commission has not yet decided whether SCSPA violated the Shipping Act, so any reparations order would be premature.

in the name of the United States by those who are entrusted with the constitutional duty to 'take Care that the Laws be faithfully executed,' U.S. Const., Art. II, § 3, differs in kind from the suit of an individual." *Alden*, 527 U.S. at 755. Moreover, the Commission cannot itself punish contempt, and its orders are therefore not coercive in the relevant sense. See *International Union v. Bagwell*, 512 U.S. 821, 831 (1994). A Commission order in an adjudication, as a regulatory determination, is no more or less coercive than an agency rulemaking would be. See 46 U.S.C. app. 1716(a) ("The Commission may prescribe rules and regulations as necessary to carry out this Act"). Indeed, the actual functional equivalence in the Commission's administration of the Shipping Act is not between an adjudication and a lawsuit, but rather between an adjudication and a rulemaking. See *SEC v. Chenery Corp.*, 332 U.S. 194, 200-203 (1947).

b. The filing of a complaint under the Shipping Act is not contingent upon a request for monetary reparations. The statute provides that any person "may" file a complaint, and additionally "may," but need not, "seek reparation for any injury." 46 U.S.C. app. 1710(a). The Commission's regulations interpreting these statutory provisions require that a complaint include "a request for the relief *or other affirmative action* sought." 46 C.F.R. 502.62(a) (2001) (emphasis supplied). Accordingly, SCSPA's emphasis (Br. 11) on Maritime Services' request for monetary reparations in its complaint is beside the point. A complaint may permissibly be filed to secure non-monetary relief (*e.g.*, a cease and desist order), to ask the Commission to seek an injunction in the agency's own name in a federal district court, see 46 U.S.C. app. 1710(h)(1), or simply to request an affirmative agency determination that certain conduct is unlawful, with no further relief sought. For this reason, the Commission has interpreted the statute of limitations in the Act, *id.* at 1710(g), to apply only to requests for monetary reparations. *Rascator Maritime S.A. v. Cargill*, 25 F.M.C. 470 (1982)

(finding that the statute of limitations in the Shipping Act of 1916 "applies only to requests for reparations"); see also 46 C.F.R. 502.63 (2001) ("statute of limitations for reparations").

In this case, Maritime Services filed its complaint in part as a means of bringing SCSPA's alleged Shipping Act violations to the Commission's attention, contemplating that the agency itself would seek injunctive relief in federal district court against SCSPA; Maritime Services also sought monetary reparations and an agency-issued cease and desist order. See JA 15 (complaint of Maritime Services) ("Maritime Services hereby respectfully requests that the Commission file suit against [SCSPA] in the United States District Court for the District of South Carolina, Charleston Division, and seek a temporary restraining order and preliminary injunction"); see also JA 51 (Maritime Services' response to SCSPA's motion to dismiss) (arguing that "the Commission is empowered to bring suit in Federal District Court against" SCSPA). SCSPA concedes (Br. 5) that this was one of the objectives of Maritime Services' complaint. Such an injunctive proceeding, under 46 U.S.C. app. 1710(h)(1), would be in the name of the Commission and would not trespass upon a state-run port's Eleventh Amendment immunity from suit in federal district court.[6] See, *e.g.*, *United States v. Texas*, 143 U.S. 621 (1892). SCSPA has not addressed the fact that Maritime Services' complaint constitutes in part a request for unquestionably permissible agency action in the agency's own name.

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[6] The Shipping Act provides that the Commission may seek injunctive relief "[i]n connection with any investigation." 46 U.S.C. app. 1710(h)(1); see *id.* at 1705(k) (suit would be in the Commission's name). The section of the Act that authorizes the Commission to seek an injunction refers to the Commission's adjudication of a privately-filed complaint as an "investigation." See, *e.g.*, 46 U.S.C. app. 1710(b) ("the Commission shall investigate [a complaint] in an appropriate manner and make an appropriate order"); see also *id.* at 1710(d) ("Conduct of investigation"); *id.* at 1710(f) ("The Commission shall make a written report of every investigation made under this Act in which a hearing was held").

c. SCSPA incorrectly contends (Br. 12-13) that an administrative agency adjudication "serves the same purpose as an Article III court." Agency adjudication exists to vindicate the public interest in the regulation of a particular industry. *Thomas v. Union Carbide*, 473 U.S. 568, 589 (1985). Adjudication also permits agencies to develop policy on a case-by-case basis in the course of vindicating that public interest. *Chenery Corp.*, 332 U.S. at 203. Judicial resolution of a "Case" or "Controversy," U.S. Const., Art. III, sec. 2, on the other hand, is intended "'to decide on the rights of individuals.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (quoting *Marbury v. Madison*, 1 Cranch 137, 170 (1803) (Marshall, C.J.)); see also *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998) ("Article III, § 2, of the Constitution extends the 'judicial Power' of the United States only to 'Cases' and 'Controversies.' We have always taken this to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process"). The purposes of administrative adjudication thus differ from those of a lawsuit. The extent to which they may be similar in form or result (*i.e.*, a complaint for monetary reparations) does not, on the whole, transform the agency's enforcement of the Shipping Act into a "functional" lawsuit. Indeed, in its order in this case, the Commission explained that whether "a complainant is able to collect on a reparations award is a separate issue, distinct from the Commission's obligation to pass judgment on the legality of allegedly unreasonable or otherwise prohibited actions." Pet. App. 37a.

III. The use of administrative adjudications to vindicate public rights does not undermine the States' immunity from suit.

The adjudication of complaints by an administrative agency such as the Commission that does not exercise judicial power has its analytical foundation in the public rights doctrine. The doctrine is based upon a "historically

recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are 'inherently * * * judicial.'" *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (plurality opinion) (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929)). Matters that are not inherently judicial need not be heard by a court; in our opening brief we suggest (Br. 34-41) that SCSPA's sovereign immunity from suit would not apply in the administrative adjudication of such matters.

SCSPA responds to this argument by asserting (Br. 14) that to uphold the Shipping Act's complaint procedures as applied to state-run ports would permit the administrative adjudication of "the very private party suits this Court has decried as running afoul of the States' sovereign immunity." To the contrary, the public rights doctrine holds that "private party disputes" – understood as disputes founded on purely private rights – must be heard by courts, in which fora SCSPA's immunity would apply. See, *e.g.*, *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, 284 (1855) (Congress cannot "remove from judicial cognizance" matters that are by nature "the subject of a suit at the common law, or in equity, or admiralty"). In the adjudication of matters involving public rights, which this case is, see FMC Br. 35-38, on the other hand, Congress has the authority to require non-Article III tribunals to administer adjudications. However, because Congress' authority to vest agencies with the power to adjudicate public rights is limited, there is no danger that the Commission's adjudication of the complaint filed against SCSPA in this case will create a "beltway around the Constitution." SCSPA Br. 14.

The limits imposed on Article III courts by the Eleventh Amendment, and the limits imposed on the resolution of matters through administrative adjudication by the public rights doctrine, are complementary. Congress may not "circumvent the constitutional limitations placed upon federal jurisdiction," *Seminole Tribe*, 517 U.S. at 73, by abrogating

the States' Eleventh Amendment immunity from suit in federal court, and Congress also may not "'transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts.'" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986) (quoting *National Insurance Co. v. Tidewater Co.*, 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting)). The "limitations placed upon federal jurisdiction" are therefore both exclusive and inclusive, as they stipulate what cannot be heard by federal courts, such as suits by private persons against unconsenting States, and what must be heard by federal courts, such as "statutory right[s] * * * not closely intertwined with a federal regulatory program." *Granfinanciera v. Nordberg*, 492 U.S. 33, 54 (1989). See also *Freytag*, 501 U.S. at 910-911 (Scalia, J., concurring in part and concurring in the judgment) (noting the limitations on Congress' authority to place the adjudication of disputes in administrative agencies). In conferring on the Commission the authority to adjudicate matters involving public rights, Congress has not improperly abrogated the States' immunity from suit in an Article III court. At the same time, because Shipping Act rights are public rights, see FMC Br. 35-38, Congress has not improperly removed the matters adjudicated by the Commission from the cognizance of the Article III courts.[7] Moreover, the Commission's limited authority to adjudicate complaints is not inconsistent with *Alden*, in which the Court explained that "an *unlimited* congressional power to authorize suits in state court" would "giv[e] Congress a power and a leverage over the States that is not contemplated by our constitutional design." 527 U.S. at 750 (emphasis supplied); see also *id.*

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[7] This case does not present the question whether in Article I courts, which exercise judicial power, a sovereign immunity defense could be maintained. See, *e.g.*, *Freytag*, 501 U.S. at 889-890 (holding that the Tax Court, an Article I body, exercises judicial power); US Br. 21 ("We may assume, arguendo, that state sovereign immunity principles would apply to proceedings before a body formally located within the Executive Branch but possessing the attributes * * * traditionally associated with courts").

(noting the difficulties that would ensue if there were "[a] general federal power to authorize private suits for money damages" in state court). We suggest that matters from which the Eleventh Amendment guarantees the States an immunity are among those which the public rights doctrine assures will be heard in judicial proceedings – heard, of course, only when a State is not an unconsenting defendant.

IV. The issue whether the United States is immune from adjudicatory proceedings conducted by its own administrative agencies is not before this Court.

SCSPA claims (Br. 24-31) that the United States itself maintains a form of sovereign immunity from federal administrative adjudications, and that the States should be entitled to a reciprocal immunity. Although the scope of the United States' immunity is entirely outside of the question presented by this case, we would note that the Court has already found that the United States is a "person" subject to the Shipping Act's provisions, *Far East Conf. v. United States*, 342 U.S. 570 (1952), and that at least one federal court of appeals has declined to accept the United States' argument, under a different statute, that it is entitled to sovereign immunity from proceedings before "executive branch adjudicatory bodies." *Tennessee Dept. of Human Serv. v. U.S. Dept. of Education*, 979 F.2d 1162, 1166 (6th Cir. 1992). This Court has not yet ruled on the application of sovereign immunity principles to an administrative adjudication against the United States.

SCSPA errs in relying (Br. 27-28) on *West v. Gibson*, 527 U.S. 212 (1999), to support its contention that an administrative adjudication implicates the Federal Government's sovereign immunity. The Court in *West* held that Title VII of the Civil Rights Act of 1964 authorized the EEOC to award compensatory damages against federal agencies in employment discrimination cases. 527 U.S. at 217. The Court also addressed the argument that a waiver of

the Federal Government's immunity was necessary in order for the EEOC to have the authority to award such damages; the Court noted that the statute waived any immunity that *might* exist. *Id.* at 222. The Court did not, however, rule on the more fundamental question whether there is such an immunity, finding instead that if the United States could be immune from administrative adjudications, its immunity had been waived by statutory design. *Ibid.* Accordingly, the Court characterized the issue as a "question concerning how the waived damages remedy is to be administered," not as an issue of the applicability of sovereign immunity principles in the first place. *Ibid.* The Court noted that "ordinary sovereign immunity presumptions may not apply" to the administrative setting, but concluded that this was a question "which * * * we need not decide." *Ibid.* Similarly, the dissent in *West* distinguished "administrative 'proceedings'" from "judicial actions," and focused on whether the waiver in question was adequate. *Id.* at 227 (Kennedy, J., dissenting).

SCSPA's amici similarly err in relying on this Court's opinion in *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512 (1984). Br. of Nat'l Gov. Ass'n *et al.* 16-17. In *Franchise Tax Board*, the Court held that Congress' waiver of the Postal Service's immunity from suit was to be broadly construed, and applied that waiver to a proceeding before a state administrative tribunal. *Id.* at 516-525. The Court relied on precedent holding that a waiver of the immunity of a government corporation should be construed very broadly. *Id.* at 517-519 (relying on *FHA v. Burr*, 309 U.S. 242 (1940)). The Court looked to Congress' "intent to waive immunity," *id.* at 521, and concluded that the intended waiver was sufficiently broad to encompass administrative proceedings. The Court did not, however, rule on the issue whether sovereign immunity principles apply in the administrative setting, but instead addressed "any sovereign immunity that the [Postal] Service *might* possess." *Id.* at 515 (emphasis supplied). It was not necessary for the Court to rule on the issue whether sovereign immunity

principles apply in administrative adjudications, because if such principles did apply, then they would have been waived; and if they did not apply, then no waiver was required.

Finally, the Office of Legal Counsel memorandum cited by SCSPA (Br. 28 and App. 4a-21a) is inapposite to this case. The memorandum was directed to the question whether the United States is a "person" under the Immigration Reform and Control Act. See SCSPA Br. App. 7a ("[t]he applicability of IRCA to federal agencies turns on whether federal agencies are 'person[s] or other entit[ies]' within the meaning of the Antidiscrimination Provision"). This Court has already held that state instrumentalities are persons, *California v. United States*, 320 U.S. at 585-586, and that the United States is a person, *Far East Conference*, 342 U.S. 570, under the Shipping Act. The reasoning supplied in the OLC memo is therefore of no analogous persuasive value, and does not support SCSPA's claim (Br. 30) that "all three branches of the federal government agree" on the application of sovereign immunity principles to agency adjudications.

V. Immunity from Shipping Act adjudications would be inconsistent with the requirement of national uniformity in the regulation of maritime commerce.

This Court recently explained that "the federal interest [in the regulation of maritime commerce] has been manifest since the beginning of our Republic," and that effective federal power over such commerce "was cited in the Federalist Papers as one of the reasons for adopting the Constitution." *United States v. Locke*, 529 U.S. 89, 99 (2000). The Court in *Locke* addressed the importance of federal maritime regulation in the context of federal preemption of state activity through administrative rulemaking. *Id.* at 115-116. In our opening brief, we argue (Br. 29-33) that sovereign immunity from Shipping Act adjudications for state-run ports would be inconsistent with the requirement of "a uniformity of regulation for maritime commerce." *Locke*, 529

U.S. at 108. SCSPA offers no response to this point, except to rely by analogy (Br. 47-48) on opinions addressing suits in admiralty, and on the holding in *Seminole Tribe* that "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." 517 U.S. at 72. As explained above (*supra* at 1-3), *Seminole Tribe* considered the scope of Congress' authority to abrogate the States' immunity from suit in federal district court, and did not address administrative regulation accomplished through adjudication. Citation to *Seminole Tribe* is no answer to the Commission's suggestion that the Founders would have held a State's assertion of sovereign immunity from federal Executive Branch authority over maritime commerce inconsistent with the constitutional design.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case should be remanded for further proceedings.

Respectfully submitted.

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